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IN THE

Supreme Court of the United States

NO. 455

BARNARD-CURTISS COMPANY and THE SEABOARD SURETY COMPANY, Surety,
Petitioners,

vs.

THE UNITED STATES OF AMERICA, for the Use and Benefit of D. W. FALLS CONSTRUCTION CO. and ACE CONSTRUCTION CO.
Respondents and Cross-Petitioners.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
QUESTION PRESENTED FOR REVIEW: In a suit under the *Miller Act, Title* 40, *U.S.C., Sections* 270 (*a*) *and* 270 (*b*), brought in the name of the United States by a subcontractor for his own use and benefit, is the time for appeal under *Rule* 73 (*a*) *of the Federal Rules of Civil Procedure* thirty (30) or sixty (60) days?	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR ALLOWANCE OF THE WRIT:	
1. The question presented involves the proper construction of the *Miller Act* and *Rule 73* (*a*) *of the Federal Rules of Civil Procedure*, having far-reaching importance in litigation arising out of Public works, which has not been but which should be determined and settled by this Court.	4
2. The decision of the Court of Appeals denied the motion to dismiss, and is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in the case of *Virginia Land Co. vs. Miami Shipbuilding Corp., 201 Fed. 2d 506.*	5
3. The decision of the Court below is believed to be erroneous, and the time to appeal under the *Miller Act* should be established at thirty (30) days.	6

Page

CONCLUSION 7

APPENDIX A:
Opinion of the United States Court of Appeals, Tenth Circuit, on appeal from the United States District Court for the District of New Mexico. App. A 1 - 4

CASES CITED:
Barnard-Curtiss Company, et al vs. U.S.A. for the Use and Benefit of D. W. Falls Construction Co., et al, 252 Fed. 2d 94 1

U.S.F. & G. Co. vs. U.S. for the Benefit of Kenyon, 204 U.S. 349, 27 Sup. Ct. 381 5

Virginia Land Co. vs. Miami Shipbuilding Corp., 201 Fed. 2d 506 5

STATUTORY PROVISIONS INVOLVED:
TITLE 28, U.S.C., FEDERAL RULES OF CIVIL PROCEDURE:
RULE 73(a) - APPEAL TO A COURT OF APPEALS 2, 3, 4, 5, 6, 7

Notes on Decisions 4

Notes of the Advisory Committee on Amendments to Rules 6

RULE 81(f) - REFERENCES TO OFFICER OF THE UNITED STATES 7

SECTION 1245 (1) - APPEAL AND CERTIORARI 2

TITLE 40, U.S.C., PUBLIC BUILDINGS, PROPERTY AND WORKS:
SECTION 270b (a) and (b), MILLER ACT, SECTION 2, 49 STAT 794 2, 4, 5, 6

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Your Respondents and Cross-Petitioners, D. W. FALLS CONSTRUCTION CO. and ACE CONSTRUCTION CO., corporations, by their attorney, respectfully pray that a writ of certiorari be issued out of and under the Seal of this Court to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit denying motion to dismiss the appeal entered in this cause on January 22, 1958.

OPINIONS BELOW

The opinion of the Court of Appeals on motion to dismiss the appeal is reported in *252 Fed. 2d 94*, and a copy thereof is appended hereto as Appendix A.

STATEMENT OF JURISDICTION

The order of the Court of Appeals of the Tenth Circuit, sought to be reviewed, denied Respondents and Cross-Petitioners' motion to dismiss, was dated January 22, 1958, and entered on the same date. (R. 8) Final judgment of the Court of Appeals on the merits was entered July 1, 1958. Petition for rehearing was filed July 21, 1958, and denied on July 24, 1958. The jurisdiction of this Court is invoked under *Title 28, U.S.C., Section 1254(1).*

QUESTION PRESENTED FOR REVIEW

In a suit under the *Miller Act, Title 40, U.S.C., Sections 270(a) and 270(b),* brought in the name of the United States by a subcontractor for his own use and benefit, is the time for appeal under *Rule 73(a) of the Federal Rules of Civil* Procedure thirty (30) or sixty (60) days?

STATUTORY PROVISIONS INVOLVED

The following statutory provisions and the pertinent parts thereof are quoted herein as follows:

MILLER ACT, SECTION 2,
49 STAT. 794, TITLE 40,
U.S.C. 270b:

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for

the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. Aug. 24, 1935, c. 642, §2, 49 Stat. 794."

RULE 73 (a), FEDERAL RULES OF CIVIL PROCEDURE, TITLE 28, U.S.C., Rule 73:

"(a) WHEN AND HOW TAKEN. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may

be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. ... ..."

STATEMENT OF THE CASE

The order of the Court of Appeals, sought to be reviewed, denied Respondents and Cross-Petitioners' motion to dismiss the appeal herein. (R.8)

The judgment of the District Court was entered July 16, 1957. (R. 7) The notice of appeal was not filed until August 16, 1957, or thirty-one (31) days after the date of the District Court's judgment. (R. 8)

Respondents and Cross-Petitioners filed in the Court of Appeals a motion to dismiss the appeal on the ground that the notice of appeal not having been filed within the time limit established by *Rule 73(a)*, the Court of Appeals was without jurisdiction.

The Court of Appeals denied the motion to dismiss and held that since the suit was in the name of the United States of America for the use and benefit of Respondents and Cross-Petitioners, that the United States was a party and, therefore, the time to appeal under *Rule 73(a)* was sixty (60) days and not thirty (30) days.

REASONS FOR ALLOWANCE OF THE WRIT

1. The question presented involves the proper construction of the *Miller Act* and *Rule 73(a) of the Federal*

Rules of Civil Procedure, having far-reaching importance in litigation arising out of public works, which has not been but which should be determined and settled by this Court.

In view of the magnitude of the Federal Government's public works program, litigation under the *Miller Act* will be of increasing importance. A reference to the *Notes of Decisions* under *Section 270(b), Title 40, U.S.C.A.*, indicates the multitude of suits filed by material suppliers and subcontractors against contractors and their sureties. The time within which such an appeal must be taken in such a suit is of utmost importance.

No decision of this Court can be found which specifically decides this question. The case of *United States Fidelity & Guaranty Co. vs. U. S. for the Benefit of Kenyon, 204 U.S. 349, 27 Sup. Ct. 381*, involved only a question of jurisdiction and did not purport to decide the time in which an appeal must be taken. *Rule 73(a) of the Federal Rules of Civil Procedure* was not in effect at the time of that decision.

2. The decision of the Court of Appeals denied the motion to dismiss, and is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in the case of *Virginia Land Co. vs. Miami Shipbuilding Corp., 201 Fed. 2d 506.*

The Fifth Circuit held that where the United States is merely a nominal or formal party to the action, the time to appeal under *Rule 73(a)* is thirty (30) and not sixty (60) days. If the United States is a party "in name only" and does not actually participate in the litigation, there is no

reason for the longer time to appeal provided for in *Rule 73(a)*.

Other cases holding the United States to be merely a formal or nominal party in actions under the *Miller Act* are cited in the Circuit Court's opinion attached hereto as Appendix A. We believe that the Circuit Court's decision herein sought to be reviewed is the only holding that the time for appeal under *Rule 73(a)* in a *Miller Act* case is sixty (60) instead of thirty (30) days.

3. The decision of the Court below is believed to be erroneous, and the time to appeal under the *Miller Act* should be established at thirty (30) days.

The Court below recognized that the time within which to appeal, established by *Rule 73(a)*, is jurisdictional. It agrees that if the United States is not a party to the action within the meaning of that rule, the appeal must be dismissed since the notice of appeal was not filed within thirty (30) days from the date of the entry of the judgment appealed from.

The reasons for allowing sixty (60) instead of thirty (30) days for appeal where the United States is a party are clearly set forth in the *Notes of the Advisory Committee on Amendments to Rules (Rule 73, Title 28, Page 428)*:

> "In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must

take time to go through the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration, and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it. Since it would be unjust to allow the United States, its officers or agencies extra time and yet deny it to other parties in the case, the rule gives all parties in the case 60 days. The Judicial Conference of the Senior Circuit Judges in 1945 recorded itself as in favor of extending the additional time of 60 days to all parties in any case where the United States or its officers or agencies were parties. The term 'officer' is defined in amended *Rule 81(f).*"

Neither the United States nor any officer or agency thereof appeared in this action. Neither the United States District Attorney or the Attorney General, nor the Solicitor General were or are concerned with the outcome of this litigation. None of them were concerned with the decision of whether or not an appeal should be taken. Except for the United States of America being named in the caption of the suit, the litigation was entirely between private litigants, conducted entirely by their private attorneys, who certainly needed no more time in which to decide to appeal.

CONCLUSION

It is respectfully submitted that *Rule 73(a)*, in granting sixty (60) days to appeal in an action in which the United States, or an officer or agency thereof, is a party was intended to grant the additional time only when the United States was an active litigant and, therefore, required the additional time to reach decisions concerning an appeal.

It is further respectfully submitted that a writ of

certiorari should issue on this Cross-Petition limited to the question herein presented.

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APPENDIX A

United States Court of Appeals

TENTH CIRCUIT

No. 5741

BARNARD-CURTISS COMPANY and THE SEABOARD SURETY COMPANY, Surety, *Appellants*, vs. UNITED STATES OF AMERICA, for the Use and Benefit of D. W. FALLS CONSTRUCTION CO., and ACE CONSTRUCTION CO., *Appellees.*	Appeal from the United States District Court for the District of New Mexico.

T. B. KELEHER, Albuquerque, N. M., for appellants.
JAMES TILLY, Denver, Colo., for appellees.
Before HUXMAN, MURRAH and BREITENSTEIN, *Circuit Judges.* PER CURIAM,

In this proceedings under the Miller Act, 40 U.S.C.A. §§ 270a-270d, the successful party below moves for dismissal of the appeal on the grounds that, not having been filed within thirty days from the entry of the judgment, the appeal is untimely and this court is without jurisdiction to entertain it. Rule 73(a), Fed. Rules Civ. Proc, 28 U.S.C.A. provides in effect that an appeal from a district court to a court of appeals may be taken within thirty days from the entry of the judgment appealed from, except that in any action in which the United States is a party, the time as to all parties shall be sixty days from such entry.

The notice of appeal was not filed until thirty-one days after entry of the judgment. If, therefore, the government is not a party to the action, the appeal must be dismissed.

The determination of our question turns on a construction of the Miller Act, providing in substance that before a contract may be awarded for the construction, alteration, or repair of any public building or public works of the United States, the person to whom the contract is to be awarded must furnish to the United States a performance bond for the protection of the United States, and also a payment bond for the protection of persons supplying labor and material in the work, for the use of the person supplying such labor or material. Persons who have not been paid for furnishing labor or material may sue upon the payment bond, and actions commenced by them must be brought in the name of the United States for the use and benefit of the person suing, in the United States District Court for the District in which the contract was performed.

In United States Fidelity & Guaranty Co. v. United States for Benefit of Kenyon, 204 U.S. 349, 27 S. Ct. 381, 383, 51 L. Ed. 516, the court had occasion to consider the precise question involved here, arising under the Miller Act's predecessor, 28 Stat. 278, which was not materially altered by the Miller Amendment. The court specifically held the United States to be a real party to the contract, and that "the interests of the government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain materials and supplies promptly and with certainty. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the government would exert its power directly for their protection." And see Davidson Bros. Marble Co. v. United States ex rel Gibson, 213 U.S. 10, 29 S. Ct. 324, 53 L. Ed. 675.

In support of his motion to dismiss the appeal, petitioner relies solely on Virginia Land Co. v. Miami Shipbuilding Corp. 5 Cir., 201 F. 2d 506. In that case, however, the appealing party was joined in the trail court over the objection of the government, and it appears that any controversy between the government and the appellant was finally determined in the trial court. On appeal of the case, the United States had no possible interest in the issues involved. Such is not the case here, for the interest of the government remains the same on appeal as it was in the proceedings below; its concern with the outcome of the litigation has in no way been terminated. Nor was our appellant joined in the proceedings below only at the direction of the trial court. See Division of Labor Law Enforcement v. Stanley Restaurants, 9 Cir., 228 F. 2d 429.

United States, for Use of Mutual Metal Mfg. Co. v. Biggs, D. C. 46 F. Supp. 8, and United States, to Use and Benefit of Platten v. Bush Construction Co., D. C. 109 F. Supp. 378, to the effect that the government is a mere formal or nominal party to actions under the Miller Act, are not persuasive. In the Biggs case, the statement is made without citation of authority, and in Bush, the court relied upon cases collected at 77 A.L.R. 205. Some of these cases are concerned with state statutes and have no application here. Of the cases construing the Miller Act's predecessors, only Equitable Surety Co. v. United States, to Use of W. McMillan & Son, 234 U. S. 448, 34 S. Ct. 803, 805, 58 L. Ed. 1394 was decided subsequent to Kenyon. While that case indicates that the Government is a mere trustee for the benefit of labormen or materialmen under the bond, it nevertheless establishes the direct concern of the government with performance of contractors under the bond, holding that, "The public is concerned not merely because laborers and materialmen (being without the benefit of a mechanic's lien in the case of public buildings) would otherwise be subject to great losses at the hands of insolvent or dishonest contractors, but also because the security afforded by the bond has substantial tendency to lower the prices at which

labor and material will be furnished, because of the assurance that claims will be paid." The Kenyon case is not cited, and there is nothing in the language of the McMillan opinion to suggest a contrary disposition.

Other cases holding the United States to be only a nominal party in these controversies are Burrell v. United States 9 Cir., 147 F. 44; United States ex rel. Maxwell v. Barrett, C.C., 135 F. 189; United States, to Use of Edward Hines Lumber Co. v. Henderlong, C.C., 102 F. 2; United States, to Use of Salem-Bedford Stone Co. v. Sheridan, C.C., 119 F. 236, and United States, to Use Anniston Pipe & Foundry Co. v. National Surety Co. 8 Cir., 92 F. 549. All of these cases were decided prior to Kenyon, and they therefor must be considered in its light. Under authority of that decision, we must conclude that the government is a party to the action and that all of the parties are accorded sixty days in which to perfect an appeal.